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Brief of Stillwell for D. C.

IN THE

Supreme Court of the United States.

Filed April 10, 1900.

George H. Earle, Jr., Receiver of the Chestnut Street National Bank of Philadelphia, Pennsylvania, Plaintiff in Error,

vs.

William Conway, Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

J. C. STILLWELL,
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BRIEF OF ARGUMENT FOR THE DEFENDANT IN ERROR.

Although the plaintiff in error has, with much ingenuity, divided his specification of error into a number of heads and sub-heads, there is really but one question in this case, and that is, Has a judgment creditor the right to issue an attachment execution out of a State court in order to bind property or money belonging to the defendant in the possession of a Receiver for a national banking association, or has such right been taken away by the exception in section 5242 of the Revised Statutes of the United States?

William Conway, the defendant in error, having obtained a judgment in the Court of Common Pleas, for Philadelphia County, Pennsylvania, against John G. Schall, issued an attachment execution (also called an attachment *sur* judgment) thereon against the defendant, and summoned the Receiver of the Chestnut Street National Bank and the bank itself as garnishees.

The question above stated suggests two inquiries: first, What was the purpose of the exception in section 5242? And, second, Is the attachment in question within the purpose of the exception?

What was the purpose of the exception in section 5242?

Section 5242 of the Revised Statutes of the United States, which is the bone of contention here, is as follows: "All transfers of the notes, bonds, bills of exchange, or other evidence of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either made after the commission of an

act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void, and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any State, county or municipal court."

There is a clear, comprehensive and cohesive scheme, developed by the above section, designed to prevent a national banking association from preferring any one of its creditors over another, by the transfer of its assets, evidences of debt owing to it, deposits to its credit, assignments of its securities, or by deposits or payments of money belonging to it, with a view to a preference of one creditor over another, and all such transfers and payments are declared to be void. Then following in the same line, the section declares that no attachment or execution shall be issued *against such association or its property* before final judgment. The purpose of this section seems to be so plain as to be beyond question. It is designed to protect all creditors of the bank. It certainly never was intended to be used, as the plaintiff in error contends in this case, to protect the bank's creditors from the reach of *their* creditors.

The original Banking Act did not contain the prohibition in reference to attachments and injunctions in State courts, but that clause first appeared in the Act of March 3d, 1873, as a new proviso added to section 57 of the Act of June 3d, 1864. As the Revised Statutes were first adopted, the proviso of section 57, which related specially to proceedings to enjoin the comptroller, was re-enacted as section 736, but all the rest of the original section was left out. That omission was, however, supplied by the Act of February 18th, 1875, which reenacted it as part of section 5198, putting it at the end of that section, as it originally stood in the revision. Mr. Chief Justice Waite, in delivering the opinion in the case of the Pacific National Bank *vs.* Mixter, 124 U. S., page 721, says: "The fact that the amendment of 1873, in relation to attach-

ment and injunctions in State courts was made a part of section 5242, shows the opinion of the revisers and of Congress, that it was germane to the other provisions incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank."

The plaintiff in error lays great stress upon the case of Bank *vs.* Mixter (*supra*), and on page 16 of his brief says that the difference between it and the case at bar "is in form and not in substance;" but just how he derives any comfort from that case, or can see any resemblance in it to the case at bar, is a mystery to us. In that case an attachment was issued under a statute of Massachusetts *by a creditor of a national banking association against the property of the bank* before a judgment had been obtained against the latter. The statute provided, that "all real and personal estate liable to be taken in execution * * * may be attached upon the original writ in any action in which debt or damages are recoverable, and may be held as security to satisfy such judgment as the plaintiff may recover;" and the court held that such attachment was void under the exception in section 5242 of the Revised Statutes of the United States. This view is in harmony with the evident purpose of the national banking law, which was to protect, first, national bank notes, and after that all the creditors of the national bank equally.

In National Security Bank *vs.* Butler, 129 U. S., 223, it appeared that the Pacific National Bank was insolvent, and had decided to close its doors and go into liquidation. At that time it owed the Security Bank $10,000, for which the latter held a certificate of deposit. The Pacific Bank, after its insolvency, and just before it closed its doors, transferred to the Security Bank certain checks, drafts, &c., as a deposit, for which the latter gave a certificate of deposit; and the Security Bank, in a suit upon the last-mentioned certificate of deposit, claimed to set off the former certificate against it. The court held that "it is sufficient, under section 5242 of the Revised Statutes, to invalidate such a transfer, that it is made in contemplation of insolvency, and either with a view to prevent the

application of the assets of the bank in the manner prescribed by chapter 4, of title 62, of the Revised Statutes, or with a view to the preference of one creditor to another. Certainly the transfer in question was made in contemplation of insolvency; made, as it was, after the directors had voted that the bank should go into liquidation, and should be closed to business, and that a receiver should be appointed; and it was made with a view, on the part of the Pacific Bank, and of its cashier, who represented it and acted for it in this transfer of its assets, to prevent the application of its assets in the manner prescribed by such chapter 4, of title 62, and with a view to prefer the Security Bank to other creditors. The transaction, if allowed to stand, could result in nothing else. The statute made it void, although there was no such view on the part of the Security Bank in receiving the transfer of the assets; and although there was no knowledge or suspicion at that time on the part of the Security Bank that the Pacific Bank was insolvent, or contemplated insolvency, or was not doing business, or that its directors had voted to close it, or that application was to be made for a receiver; and although the transfer took place before the application was actually made to the comptroller for the appointment of a receiver."

In National Bank *vs.* Colby (88 W. S. R., 613), Mr. Justice Field, in delivering the opinion of the court, after citing the provisions of the Act of Congress in regard to the insolvency of national banking associations, said: "There is in these provisions a clear manifestation of a design on the part of Congress, *first*, to secure the Government for the payment of the notes, not only by requiring, in advance of their issue, a deposit of bonds of the United States, but by giving to the Government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, *second*, to secure the assets of the bank for a ratable distribution among its general creditors.

"This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings. The priority of the United States, and the ratable dis-

tribution among the general creditors so studiously provided for in the Act, would in that case be lost."

To the same effect is the decision in Robinson *vs.* Bank, 81 New York, 385.

Apparently considerable confusion exists in the mind of the plaintiff in error as to what mesne process is. He seems to think that the attachment execution in the case at bar is mesne process; but, as we expect to show hereafter, it is not mesne but final process, so far as its effect as an attachment of property is concerned, and so far as it affects the garnishee personally, it is original process in the nature of a summons.

The plaintiff in error cites the following cases in support of his claim that the attachment in the present case is mesne process; but all of these cases were commenced by *attachment* (or injunctions having the effect of an attachment) *of the property of a national banking association by mesne process at the suit of creditors of the bank before any judgment had been obtained*, which is as different from the process issued in the present case as may well be. These cases the defendant in error begs to cite as sustaining his contention—that the prohibition contained in section 5242 of the Revised Statutes of the United States does not apply to an attachment such as was issued in this case, but only applies to such attachment, &c., as would give one creditor of a bank a preference over the other creditors; Pacific National Bank *vs.* Mixter, 124 U. S., 721; Garner *vs.* Second National Bank, 66 Fed. Rep., 369; Central National Bank *vs.* Richland, 52 How. Pr., 136; Rohner *vs.* First National Bank, 14 Hunn, 126; Planters' Loan and Savings Bank *vs.* Berry, 91 Georgia, 264; Safford *vs.* First National Bank, 17 Atlantic Reporter, 748; Freeman *vs.* National Bank of the Republic, 35 N. E. Rep., 865, 866; Raynor *vs.* Pacific National Bank, 93 N. Y., 371; Cadle *vs.* Tracy, 11 Blatch., 101; Chesapeake Bank *vs.* Bank, 40 Maryland, 269, and National Bank *vs.* La Due, 39 Maine, 415.

In Corn Exchange Bank *vs.* Blye, 101 N. Y., 303, section 5242 was considered. Certain securities were deposited with

the Middletown National Bank as collateral security for a draft, which latter had been sent to the bank for collection. The draft was not paid, and the owner caused to be issued a requisition, in the nature of a writ of replevin, against the Receiver of the bank to recover possession of the securities. The court said: "The sole question in this case is whether section 5242 of the United States Revised Statutes prohibits the requisition issued to the sheriff and protects the Receiver in his possession. The Bank of Middletown became insolvent, and the defendant was appointed Receiver under the federal law. That appointment vested in him all the assets of the bank, to be converted into money and distributed among the creditors. The object sought to be accomplished is the distribution of these assets fairly and without preferences, *and that has been held to be the only aim of the section in question.*" And the court sustained the requisition.

The defendant in error has been unable to find a case, and believes that none exists, where the court has held that an attachment issued against the property of a judgment debtor in the hands of a national banking association was rendered void by section 5242.

Is the attachment in question within the purpose of the exception in section 5242?

To answer this question we are necessarily led to a consideration of the nature and effect of the attachment issued in this case.

The right to issue the attachment exists by virtue of certain Acts of Assembly of the State of Pennsylvania, which are set out on pages 38, 39, and 40 of the paper book of the plaintiff in error, and are hereafter referred to. These Acts provide a method by which a judgment against a defendant may be levied of the effects of the defendant in the garnishee's hands. The record of this case shows that nothing else was attempted. There is no pretense disclosed by the record that any of the bank's property is bound or attempted to be bound by the attachment, but merely the property of Schall, the defendant in the judgment.

The Act of June 16th, 1836, section 35 (Pepper & Lewis, Digest, page 1939), is as follows: "In the case of a debt due the defendant, or of a deposit of money made by him, or of goods or chattels pawned, pledged or demised, as aforesaid, the same may be attached and levied in satisfaction of the judgment in the manner allowed in the case of foreign attachment, but in such case a clause in the nature of a *scire facias* against a garnishee in foreign attachment shall be inserted in such writ of attachment requiring such debtor, depositary, bailee, pawnee, or person holding by demise as aforesaid, to appear at the next term of court, or at such other times as the court from which such process may issue shall appoint, to *show cause why such judgment shall not be levied of the effects of the defendant in his hands.*"

The effect of such an attachment is stated in section 37 of the same Act (Pepper & Lewis' Digest, page 1942), as follows: "From and after the service of such writ all stock belonging to the defendant in the corporation upon which services shall be made, and all debts and all *deposits of money and all other effects belonging or due to the defendant,* by the person or corporation upon which service shall be so made, shall remain attached in the hands of such person or corporation in the manner heretofore practiced and allowed in the case of foreign attachment."

The *status* of the garnishee named in an attachment execution has been clearly defined by decisions of the courts of Pennsylvania. In Patton *vs.* Wilson, in 34 Penna. St. Repts., 299, it was decided that an attaching creditor stands in the shoes of his debtor; and any equities that could be set up against the latter are equally available against the former.

In Myers *vs.* Baltzell, 37 Penna. St. Rep., 491, it was held that the attachment in no way interferes with any right of the garnishee, but leaves to him all the rights of set-off, defalcation, or defense incident to the relation of the parties at the time of service. Citations to the same effect could be multiplied almost indefinitely.

Let us examine the writ of attachment, which will be found on page 14 of the printed record. It shows, as clearly as language can make it, that the attachment is directed against Schall, the defendant in the judgment, and not against the bank. The name of the bank appears merely as a custodian, or possible custodian, of property belonging to the defendant, or as a debtor owing money to him. The clause directed to the bank is in the nature of a summons requiring the garnishee of the bank to show cause why the judgment against the defendant should not be levied of the defendant's property or deposits in the garnishee's hands. The wording of the writ is in no sense ambiguous, and, it seems to the defendant in error, ought to settle any doubt, if any exists, that the attachment is not against the garnishee, but is against the defendant, Schall's, property. Referring to the writ, we find these words: "To the sheriff," &c. * * * "We command you that you levy upon and attach the goods * * * ," &c., "of John G. Schall, defendant, in satisfaction of a certain judgment, * * * and also that * * * you make known to the said defendant, and to the Chestnut Street National Bank, and George H. Earle, Jr., Receiver, * * * and all other persons in whose hands or possession the said goods * * * &c., may be attached as garnishee, that they may appear * * * to show * * * why the said judgment * * * should not be *levied of the effects of the said defendant in the hands of said garnishee.*"

The Act of Congress does not say that no writ bearing the name "attachment" shall be issued, but merely uses the word "attachment" to designate a writ, well known to the law, under which property or a person is attached or taken possession of, either in fact or by operation of law, to satisfy a demand. There can be no pretense, it seems to the defendant in error, that the writ in this case attaches anything belonging to the bank, or that it attaches the bank, its officers, or Receiver in person. The Act of Assembly above quoted provides for no such writ, neither does the present writ purport to have such operation. Both the Act and the writ provide for the issuing

of an attachment against the goods of Schall, the judgment debtor, and against these alone.

The nature and effect of the writ in the case at bar may be further disclosed by considering the character of the judgment that may be taken against the garnishee. The Act of 1836, Sect. 38 (Pepper & Lewis' Digest, page 1943), declares that the judgment shall be as follows:

"If judgment shall be given for the plaintiff in such attachment, it will be lawful for him to have execution thereof, as follows, to wit:—

"I. If the property attached be stock in a corporation, as aforesaid, the execution shall be by writ of *fieri facias against the original defendant*, by virtue of which such stock, or so much thereof as shall be necessary to satisfy the judgment and costs, may be sold by the sheriff, as in other cases.

"II. If the property attached be a deposit of money or a debt due, as aforesaid, execution shall be had in the manner allowed in the case of effects in the hands of a garnishee in foreign attachment." And how is that? Let us again turn to Pepper & Lewis' Digest, page 2161, title, "Foreign Attachment," and we find that the Act of June 13th authorizes the following proceedings: "The goods and effects of the *defendant* in the attachment in the hands of the garnishee, shall, after such service, be bound by such writ."

The 54th section of the same Act directs, that after judgment is entered against the defendant the plaintiff may have a writ of *scire facias* against the garnishee, commanding him to show cause, if any he has, why the plaintiff should not have execution of his judgment *of the estate and effects of the defendant* attached as aforesaid *in his hands.* The plaintiff then, by section 55, is empowered to exhibit interrogatories to the garnishee touching the estate and effects of the defendant in his possession, which interrogatories the garnishee, by section 56, is required to answer. (See Pepper & Lewis' Digest, pages 2167, 2168, 2169.)

Sections 59 and 60 of said Act (Pepper & Lewis' Digest, page 2170) are as follows:—

"After a verdict for the plaintiff on any *scire facias*, as aforesaid, it shall be lawful for him to have execution of his judgment in the attachment to be *levied of the goods and effects so found in the hands of the garnishee*, or of so much of them as shall be sufficient to satisfy his demand, together with legal costs of suit and charges as aforesaid.

"The plaintiff may also, at the same time, have execution against the garnishee upon the judgment obtained against him on the *scire facias, as in the case of a judgment against him for his proper debt, if the garnishee shall neglect or refuse upon the lawful demand of the proper officers to produce and deliver the goods and effects of the defendant as aforesaid or to pay the debt or duty attached if the same shall be due and payable.*"

From the foregoing it would seem to be a waste of time to argue the question as to whether the attachment is against the bank or its property. The only possible way that either could be liable to the plaintiff in the attachment would be after the court had entered judgment against the garnishee that there *was* property or money in its hands belonging to the defendant, and then for the garnishee to fail to produce the property or money in satisfaction of the judgment. The result in such case would be, that the garnishee's own property would be liable for the judgment, just as any defendant's propety is liable for a common-law judgment entered against him.

There is a provision in the exception in section 5242 which has been lost sight of by the plaintiff in error, and that is, that no execution, &c., should issue against the bank before "final judgment in any suit," &c. It cannot be asserted in this case that there is no final judgment, for a final judgment has been obtained against Schall, from which no writ of error or appeal has been taken.

It seems impossible to escape the conclusion that the sole care of Congress, in making the exception in the section above mentioned, was to protect the assets and property of the bank for its creditors; and for that purpose directed that no person

by an attachment, or anything in the nature thereof, issued before obtaining a final judgment against the bank, could acquire a preference over other creditors, equally meritorious but not so fortunate as to acquire an earlier lien. It is just such a provision as all the bankruptcy laws contain ; and as insolvent national banking associations cannot go into bankruptcy, but must have their affairs settled and assets distributed through the mediumship of the comptroller, and a receiver appointed by him, all preferences and inequalities, as between creditors of the same class, are sought to be prevented by the section in question.

Then again, the orderly and logical settlement of the affairs of an insolvent national banking association, and the distribution of its assets among its creditors, ought not to be interfered with, whilst a question as to the priority of a lien upon, or attachment against, its assets is being litigated in a State court; this the National Banking Act clearly intends to prevent. But the attachment issued in the case at bar, could not in any possible way interfere with the calling in and sale of the assets of the bank, and the distribution of the proceeds among the bank's creditors and stockholders, because there is no question that the only effect of the attachment in this case is to prevent the Receiver from paying to Schall the amount of his dividend, and, instead, requires the Receiver to pay it to the plaintiff in the execution in satisfaction of his judgment against Schall. That Schall should get the dividend, and not his creditor, is certainly not within the contemplation of the Act. It would be much more reasonable to suppose that Congress intended that Schall's dividend should be used to pay his debts rather than to be so applied, with the aid of the Receiver, that Schall's creditors shall be deprived of all opportunity of reaching it. Yet if the construction contended for by the plaintiff in error is correct, the latter result would be reached ; for how, then, could a creditor of John G. Schall, after having obtained a judgment against him, reach any property of his in the possession of a national banking association? If the Act means that no execution or attachment shall be *issued* against the property of Schall in the possession of the

bank until a judgment is obtained against the latter, then the creditor would be without remedy; for there is no way, under the law of Pennsylvania, by which a creditor can reach a debt due to his debtor by a third person except by an attachment. Conway cannot sue the bank, because there is no privity of contract between him and the bank. The bank owes Conway nothing; therefore, he could not recover such a judgment against it as the plaintiff in error claims he would be obliged, in some way, to get before he issued an attachment. The argument of the plaintiff in error leads to the conclusion that in Pennsylvania a debt due to a man by a national banking association is absolutely safe from the reach of his creditors. But we think such a construction of the Act is clearly at variance with its meaning and purpose.

J. C. STILLWELL,
Attorney for Defendant in Error.

In the

Supreme Court of the United States

(Record No. 17,307.)

October Term, 1899. No. 219.

George H. Earle, Jr., Receiver of The Chestnut Street National Bank,

Plaintiff in Error,

v.

William Conway,

Defendant in Error.

Supplemental Brief on Behalf of the Defendant in Error.

In the original brief of the plaintiff in error, the only question discussed was whether or not the attachment issued in this case was in violation of the exception in Section 5242 of the Revised Statutes of the United States; but in his supplemental brief the plaintiff in error raises and discusses an entirely different question, and that is, whether or not the attachment being against a receiver of a national banking association can be sustained on any ground. He bases his argument on three points:

1. That the receiver was obliged, under the provisions of the Act of Congress in reference to such associations, to transfer the assets into the treasury of the United States, subject to the

order of the Comptroller of the Currency, and therefore, he had nothing in his hands which could be bound by our attachment.

2. If such an attachment is sustained, it will impose upon the receiver a great hardship, namely:—that of employing counsel to appear in the proceeding and answer the plaintiff's claim; and

3. That it will also subject the funds of the association to the expense of paying for such services.

I.

It must be admitted that the Comptroller of the Currency exercises judicial functions in the liquidation of the affairs of national banking associations. He is authorized by Section 5234 of the Revised Statutes, on becoming satisfied that any association has refused to pay its circulating notes, etc., to appoint a receiver, and require a bond from him; whereupon it is the receiver's duty to take possession of the books and assets of the association, collect its debts, and, upon order of a court of competent jurisdiction, sell its real and personal property, and if necessary, enforce the individual liability of its stockholders. He must pay all moneys realized into the treasury of the United States, subject to the order of the Comptroller, and make report to the latter of all his acts. It is then the duty of the Comptroller, after first protecting the claims of the United States, to declare dividends on all such claims as may have been "proved to his satisfaction, or adjudicated in a court of competent jurisdiction."

By section 5237, if the association denies that it is in default it may apply to the circuit or district court for an injunction to restrain the receiver from proceeding.

It is clear that in the appointment of the receiver, accepting proof of claims and declaring dividends the Comptroller

exercises judicial functions; but it is impossible for him to proceed without the co-operation of the receiver, for it is the receiver's duty, and not the Comptroller's, to take possession of and convert the assets, contest disputed claims, and perform other duties necessary for the winding up of the insolvent association.

By section 3 of the act of Congress of August 13, 1888, U. S. Stat. at Large, p. 436–7, it is provided that "Every receiver or manager of any property, appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same may be necessary to the ends of justice."

The plaintiff in error says that even if a Treasurer of the United States could be attached, we have not served our attachment upon him. That is quite true, we have not served the comptroller, who, as we believe we have shown, is a judicial officer. Nor can we. Nor could we serve a judge, or a court, in a proceeding against a receiver appointed by it. It is enough to serve the receiver, and having established in such suit, our right to the dividend, we would expect the court to make a proper distribution of the fund in its control.

What difference is there between the present case and that of a receiver appointed by a court of chancery? There the receiver is the agent of the court. The moneys he collects are in the custody of the court. The act of Congress when it requires the receiver to pay the money into the United States Treasury, subject to the order of the comptroller, is but designating the depository in which the funds shall be kept. For the purposes of this case, the Treasury of the United States is the bank, and the funds of the insolvent association are earmarked and set aside, subject to the comptroller's order; and he makes his order when claims are "proved to his satisfaction, or adjudicated in a court of competent jurisdiction."

The plaintiff in error cites *Re Chetwood*, 165 U. S. 443, as sustaining his contention that a receiver appointed by the comptroller is different from one appointed by judicial authority; but that case merely decides that a receiver is under the control of the officer appointing him, and does not become an officer of a court to which he applies for the purpose of selling personal property of the bank.

It was decided in *Conshohocken Tube Co.* v. *Equipment Co.* defendant and the receivers of the Philadelphia & Reading R. R. Co., garnishees, 167 Penn St. Rep. 592, that money in the hands of a receiver was the subject of an attachment execution.

An attachment execution against a corporation in the hands of a receiver is properly served upon the receiver, and such service entitled the plaintiff in the attachment to the dividend in the receiver's hands when declared.

Merchants' National Bank v. *Binder*, 6 Penna. Dist. Repts. 633.

In *McNulta* v. *Lockridge*, 141 U. S. 327, it was said that the proper way to sue a corporation is to sue it by its name in the hands or possession of the receiver, but the writ should be served on the receiver, because he is the representative of the corporation in dealing with its creditors. Actions to recover its property must be brought in its name for the use of its receiver.

Yeager v. *Wallace*, 44 Pa. S. Rep. 294.

A receiver may maintain action in his own name on a contract with him.

Singerly v. *Fox*, 75 Pa. 112.

Therefore, we submit, that the attachment in this case, having been served upon the receiver, binds the Comptroller as much as he could be bound in any case.

Strictly speaking, there is no way to get the money of a national banking association out of the treasury of the United States, except by an Act of Congress or through the Court of Claims. The law requires the receiver to collect the

funds and pay them into the treasury of the United States, subject to the order of the Comptroller of the Currency. How the latter can be compelled to pay over these moneys to the creditors seems to be in doubt. The law requires him to pay these moneys "in due course of administration," and we should assume that he will comply with the law. But any practical difficulty that may exist by reason of the peculiar conditions which surround the settlement of the affairs of insolvent national banking associations is solved by moulding the decree or judgment in such a way as will do justice to the parties, without, in so many words, giving a decree or judgment against the comptroller or a right of execution thereon against him.

In *Case* v. *Bank*, 100 U. S. 446, a suit against a receiver of a national bank, the judgment was that the receiver "do pay the same or certify the same to the Comptroller to be paid in due course of administration."

In *Merritt* v. *First National Bank*, 75 Fed. Rep., 148, it was decided that in a suit against a receiver of an insolvent bank to establish the claim of a creditor and his right to a dividend, the decree should not direct the payment of the dividend by the receiver, since the assets of such bank are under the statutes entirely within the control and disposition of the Comptroller of the currency, but such decree should direct that the claim of the creditor, as established, be certified to the Comptroller, to be paid in due course of administration.

In *Richardson* v. *Louisville Banking Company*, 94 Fed. Rep. 442, which was a suit against a Receiver of a national banking association, objection was made to the form of the decree because it commanded the receiver to pay over to the plaintiff a sum of money within ten days, when as a matter of fact, in accordance with the law, the receiver had not in his custody the funds in question, but the same were in the hands of the Comptroller of Currency. It was argued that by the decree, as rendered, it might appear that the receiver would

be held in contempt for not paying over moneys which were not in his control. The Court, however, met this objection by amending the decree so as to direct that the plaintiff should recover from the receiver a sum of money within thirty days, or that he should, within said time, certify the decree to the Comptroller of the Currency.

Suppose a bank has improperly converted the property of another. The Receiver of the bank having transferred its assets to the Comptroller, cannot be held personally liable for that which he has not in his possession. What remedy has the creditor except to sue the receiver and get a judgment, that the latter certify the same to the Comptroller of the Currency Having complied with such decree, by certifying, the judgment to the Comptroller, the receiver has performed his whole duty, and the creditor must then look to the Comptroller. We submit that that case is substantially similar to our own, for we are seeking Schall's property which ought to be in the possession of the bank or its receiver, but is not, he having transferred it, as we assume, to the Comptroller.

But in assuming that all the assets are transferred are we not assuming too much? How do we know that the Receiver has turned over all the assets of the bank to the Comptroller? The act of Congress, by no means, makes such an inference a necessary one. By the Act of June 30, 1876; Part 3 of the Revised Statutes, p. 107, and amendments threof provision is made for the transfer of the assets of a national bank, which has paid its creditors in full, still remaining in the possession of the Comptroller *and Receiver* or either of them, to an agent appointed by the stockholders of the bank, for the purpose of reorganization.

If the assets were wholly in the custody of the Comptroller by operation of law, what need was there for the Receiver to join in the reconveyance to the bank's agent?

The above provisions show the intimate relations existing between the Comptroller and the Receiver. He stands to represent the bank and the Comptroller in any controversies

between them and those having claims against the bank. It is against the receiver and not the Comptroller that suits must be brought. When we served our attachment on the receiver we bound both the Comptroller and the bank so far as the distribution of its assets was concerned; and when we have obtained judgment against the receiver, we will have a claim to a dividend which "has been adjudicated in a Court of competent jurisdiction."

It is submitted that the difficulty, if any, that exists in the case of an attachment execution issued against the funds of a depositor in the hands of the receiver by reason of the fact, if such is the fact, that the assets of the bank are, by operation of law vested in the Comptroller, is no greater than that which exists in the case of a claim of an ordinary depositor against the bank, or its receiver, for his share of the dividend. He does not sue the Comptroller, but the receiver. The judgment that he recovers against the receiver does not give him any right against the receiver personally, but merely establishes a claim, which it is the duty of the receiver to certify to the Comptroller, and it will be the duty of the Comptroller to pay in due course of administration. But, it is suggested, suppose the Comptroller does not pay, what will be your remedy then? We might answer "Sufficient unto the day is the evil thereof." But if such a complication should arise, there is no doubt that the Comptroller would be personally liable in another suit, or the claim could be prosecuted through the Court of Claims.

All that the defendant in error claims or contends for here, is, that by issuing his attachment he stands in the shoes of Schall, the judgment debtor, and has succeeded to the latter's right to proceed against the receiver, the Comptroller, or whoever it may be that is liable for the fund. The issuing of the attachment in this case, merely acted as an assignment of so much of Schall's right against the bank as may be necessary to meet Conway's demand against him. It follows as a logical conclusion that if Schall had a right to

establish his claim to a portion of the fund in the Comptroller's custody, through a suit against the receiver, then Conway, by issuing his attachment, has the same right. If Conway had no right to proceed because the fund was not in the receiver's control, then Schall, for the same reason, would have no such right.

The plaintiff in error has cited the case of *Hicks* v. *Jenks*, 123 U. S. 297, as establishing the proposition that a receiver of a national bank is not accountable in equity to the owner of real estate for rents thereof received by him as such receiver, and paid by him into the treasury of the United States. But he omitted to mention that these rents had not only been collected and paid to the Comptroller, but also distributed by him as part of the assets of the bank. We never contended that the receiver would, in any case, be liable for doing his duty, viz.: paying the moneys which came into his hands into the treasury of the United States, nor be liable for the act of the Comptroller in making distribution of the funds in his hands. Further than that the case does not go.

II.

The second point urged by the plaintiff in his supplemental brief is, that if this attachment is sustained it will impose a hardship upon the receiver by compelling him to employ counsel to defend such claims. As to this, all that need be answered is, that such a hardship is no greater than that which arises in every case where a suit is brought against a Receiver. Of course a receiver cannot admit every claim that is presented; and if any dispute arises, it is his duty to see that the claim is duly litigated to final judgment. The hardship in the one case is no greater than in the other. And even if the payment of the claims of attaching creditors is an additional burden, is that any reason why the claim of the creditor, however just it may be, should be thrown out of Court, and the money which ought to go to pay his debt be

given to his debtor free from any possible claim of his? It seems to us, we respectfully submit, that to state this question is to answer it in the negative.

III.

The third contention is, that if this attachment is sustained, the expense of litigating the question will fall upon the assigned estate. This point is entirely without merit, for the reason, that under the law of the State of Pennsylvania, and we believe under the law of every State where similar attachments are permitted, there is a provision which authorizes the Court, in giving judgment against a garnishee in an attachment, such as in the present case, to award, first to the garnishee, a reasonable attorney's fee, so that he will not be at any expense by reason of the attachment.

The Act of April 22, 1863 (P. L. 527 Section 1) (P. & L. Dig. p. 1947) is as follows: "Where in an attachment execution or *scire facias* on foreign attachment, issued out of any Court of Record in this State, the garnishee, after issue joined therein, shall be found to have in his possession or control no real or personal property of the defendant, nor to owe him any debt, other than such property or debts as shall have been already admitted by the plea or answers of the garnishee, or in case, without going to trial the plaintiff shall take judgment against the garnishee for what shall be so admitted in his plea or answer, then, and in either such case, the garnishee shall be entitled, in addition to the costs already allowed by law, to a reasonable counsel fee out of the property in his or their hands, to be determined and taxed, in case of dispute, by the Court, or by some person or persons appointed for that purpose."

By 1st section of the act of June 11, 1885, P. L. 107, Penna. (Pepper & Lewis Digest, p. 2170) garnishees having no assets in their hands are allowed a counsel fee of ten dol-

lars, in addition to their record costs, which must be paid by the plaintiff.

By the 1st section of the Act of April 29, 1891, P. L. 35, Penna. (Pepper & Lewis Dig., p. 2166) in every case in which a garnishee appears by attorney a fee of ten dollars is allowed in addition to record costs.

* * * * *

The Act of Congress of August 13, 1888, section 4, declares, "That all national banking associations . . . shall, for the purposes of all actions by or against them, . . . be deemed citizens of the States in which they are respectively located; and in such cases, the Circuit and Districts Courts shall not have jurisdiction other than as they would have in cases between individual citizens of the same State."

Section 5198 of the Revised Statutes is as follows: "Suits, actions, and proceedings against any association under this title may be had in any District, Circuit or Territorial Court of the United States, held within the district in which the association may be established, or in any State, County or Municipal Court in the county or state in which the said association is located, having jurisdiction in similar cases."

The above acts, and sections 915 and 916 of the Revised Statutes, which provide that the proceedings in the Circuit and District Courts of the United States, by attachment and other process shall be the same as that established by the laws of the States within their respective districts, shows a clear intention in the legislative mind to subject national banking associations, and those dealing with them, to the same remedies and proceedings, as between citizens of the same States, as are given by their respective States. The remedy by an attachment execution for the collection of claims and debts due to the defendant, is a most important one, and to take it away would be, not only aiding the judgment debtor to defraud his creditors, but would be a blow dealt at the administration

of justice as now established. The Act of Congress should not be so construed as to protect one class of creditors at the expense of another class. The tendency of modern times is not to protect a man from his creditors, but to place his property within the reach of all lawful claims against him.

We must respectfully submit that expediency is a very poor reason for advocating such a radical change. We have shown that Conway by his attachment execution stands in Schall's shoes, just as though he had an assignment of his claim, and that the difficulty of recovering against the receiver in his case is no greater than it would have been had Schall himself sought to enforce his claim. We have also shown that it would entail no real hardship upon the receiver, and no expense upon the assigned estate.

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